

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD HAYES,

Defendant-Appellant.

UNPUBLISHED

March 18, 2003

No. 239326

Wayne Circuit Court

LC No. 01-006678-02

Before: Griffin, P.J., and Neff and Gage, JJ.

MEMORANDUM.

Defendant appeals as of right from a nonjury conviction of larceny in a building, MCL 750.360, for which he was sentenced to five years' probation.¹ We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole issue on appeal is that trial counsel was ineffective because she failed to call two witnesses who would corroborate defendant's testimony that the computer system he allegedly removed from the building belonged to him. Defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing,² review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of

¹ After defendant filed his claim of appeal, he was found guilty of violation of probation and sentenced to 137 days in jail. Neither the probation violation proceeding nor the sentence are at issue here.

² Defendant's motion to remand for an evidentiary hearing was denied by this Court on October 29, 2002.

reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), lv gtd on other grounds 467 Mich 868 (2002) (citations omitted).]

“Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (citations omitted). “Ineffective assistance of counsel can take the form of a failure to call witnesses or present other evidence only if the failure deprives the defendant of a substantial defense.” *People v Bass (On Rehearing)*, 223 Mich App 241, 252-253; 565 NW2d 897 (1997). “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

The only evidence in the record was defendant’s statements that his daughter’s supervisor had given the computer to his daughter, and she had left it in the car she sold to defendant.³ Even assuming defendant had been in legal possession of the computer, such evidence would not contradict witness Alls’ testimony that he observed defendant and another man remove a stove from the building, put it in the trunk of defendant’s car and drive away with it. That testimony, combined with witness Smith’s testimony that defendant did not have permission to be in the building or remove anything from it, was sufficient to prove the crime charged beyond a reasonable doubt. *People v Sykes*, 229 Mich App 254, 278; 582 NW2d 197 (1998). Therefore, defendant has not shown that a reasonable probability exists that had counsel called the witnesses, the outcome of the trial would have been different.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Hilda R. Gage

³ Attached to defendant’s brief on appeal is a copy of an undated affidavit of his daughter filed in support of the motion to remand. In the affidavit, defendant’s daughter claims to have had a letter from a co-worker affirming that the co-worker gave the computer to defendant’s daughter. No copy of the letter from the co-worker is attached to the affidavit which alleges that the letter was forwarded to defense counsel who failed to act on it. Likewise, there is no affidavit from the co-worker attesting to these purported facts.